APPENDIX "A"
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, Secretary of Defense, WALTER T. SKALLERUP, JR., Deputy Assistant Secretary of Defense, Appellants, vs. JOSEPH J. REMENYI, Appellee.	)	No. 21,615

[February 28, 1968]

Appeal from the United States District Court for the Central District of California

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Before: BARNES, HAMLEY and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

This cause involves the attempt of Jospeh J. Remenyi, an American citizen, to obtain clearance for access to information classified as "secret" in accordance with Executive Order 10501, 18 Fed. Reg. 7049. He was an employee at the Rocketdyne Division of North American Aviation, Inc., at Canoga Park, California, and had clearance at the "confidential" level, which he needed in order to continue such employment. However, Remenyi desired the higher "secret"

clearance which would presumably have enabled him to enlarge his scope of employment at the Rocketdyne plant. The need for such clearance is an outgrowth of the Industrial Personal Security Program administered by the Department of Defense (Department). This program is administered pursuant to the provisions of Executive Order 10865, 25 Fed. Reg. 1583 and, at the times here in question, Department Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation," dated July 28, 1960.

After processing Remenyi's application, the Department, on November 12, 1963, notified him and his employer that any authorization Remenyi possessed for access to classified information was suspended. The notice stated that the Screening Board had concluded that the information available to it did not warrant granting Remenyi a "secret" clearance and that, pending final disposition of his case, access was not authorized at any level. As a result of such suspension, Remenyi's employer terminated his employment.

The suspension was directed by the Industrial Personnel Access Authorization Screening Board of the Department in accordance with the provisions of Directive 5220.6, as it then existed. As required by that directive, the Screening Board issued at the time of the notice a "Statement of Reasons," informing Remenyi of the grounds upon which his security clearance was being denied or revoked. Remenyi filed an answer and requested a personal appearance hearing before an Industrial Personnel Access

Authorization Field Board. The case was referred to the Los Angeles Field Board for hearing.

Such a hearing was held, followed by a second hearing. As a result, the Field Examiner reported his conclusion that " . . . it would not be clearly consistent with the national interest to grant [Remenyi] access authorization to classified information at any level." Based on this report, the Central Board issued its final determination concurring in the conclusion of the Field Examiner.

Remenyi then commenced this action. He seeks a judicial declaration that the procedures followed in the administrative hearing and the manner of conducting the hearing were illegal, that the result reached deprives him of the right to be gainfully employed and that such result is arbitrary, capricious and not supported by any evidence. Remenyi also asked for an order granting him access to information of the armed services classified as secret, and awarding him restitution for his loss of earnings. Defendants answered, asserting various defenses.

A trial was had to the court, without a jury, and judgment was entered for Remenyi. The district court found, concluded and determined that the procedure before the Central Board and the Field Board had been conducted in an arbitrary manner and did not conform to the requirements of due process. The court ordered that certain materials be expunged from the record of the personal appearance proceedings before

the Field Examiner and the Authorization Board. The court further ordered that Remenyi be granted access authorization to information classified as secret by the United States Army, Navy and Air Force. Finally, the court remanded the cause to the Central Industrial Personnel Access Authorization Board for further proceedings in conformity with the judgment. The court did not award restitution.

The finding and conclusion that the administrative proceedings had been conducted in an arbitrary manner and not in conformity with the requirements of due process was based upon these four determinations by the district court:

1. Remenyi was not permitted to confront the witness testifying against him nor to know the witness' identity;

2. The transcript of the personal appearance proceedings held on February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings;

3. Counsel representing defendants improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of Remenyi or the latter's counsel and without consent on the part of Remenyi or his counsel;

4. Evidence not properly authenticated was admitted into the record of the personal

appearance proceedings and considered by the Field Board and the Central Board.

Defendants appeal.

In the district court, defendants strenuously contested Remenyi's contention that the administrative procedures followed in this particular case were invalid. But since the district court determination in favor of Remenyi on this point rests upon findings of fact which defendants do not wish to challenge on appeal, they have elected not to contest, in this court, the district court's direction that the cause be remanded for further administrative proceedings.

Defendants do challenge here, most vigorously, the authority and jurisdiction of the district court to order that Remenyi be granted access to information classified as secret by the United States Army, Navy and Air Force. As to this, the gist of defendants' argument is that the control over military secrets is an executive function which has never been, and should not be subject to judicial control. Remenyi contends, just as urgently, that the administrative record contains only evidence affirmative to him, supporting his application, and where this is the case the district court has authority and jurisdiction not only to remand the matter to the agency, but to do so with directions to grant the applicant access to information classified as secret.

The question thus presented encompasses difficult and far-reaching constitutional problems

concerning the scope of judicial review in light of the principle of separation of executive and judicial powers. But it is presented on an administrative record which Remenyi contends, and for the purpose of this appeal, defendants concede, was made as the result of invalid administrative procedural action. What may be the outcome of the further administrative proceedings which have been ordered cannot now be known. In analogous circumstances, the Supreme Court has declined to consider constitutional questions raised as the result of administrative proceedings which were defective. See Greene v. McElroy, 360 U.S. 474, 508. This is in keeping with the long-established principle that federal courts ought not to pass on constitutional questions unless such adjudication is unavoidable. See Rosenberg v. Fleuti, 374 U.S. 449, 451.

These considerations convince us that the district court ought to have awaited the results of the further administrative proceedings before making a determination which involves the constitutional principle of separation of powers. Accordingly, and without passing upon the merits of the questioned decretal provision, the cause is remanded to the district court with directions to delete the provision of the judgment which requires that Remenyi now be granted access authorization to information classified as secret by the United States Army, Navy and Air Force, and to delete all findings intended to support that provision of the judgment or findings which are otherwise critical of the agency's action, other

than findings intended to establish that impermissible administrative procedures were followed. In all other respects the judgment is affirmed.

APPENDIX "B"

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JUL 18 1966

Clerk, U.S. District Court
Southern District of California
By Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

JOSEPH J. REMÉNYI, Plaintiff, vs. ROBERT S. McNAMARA, Secretary of Defense, WALTER T. SKALLERUP, JR., Deputy Assistant Secretary of Defense, Defendants.	No. 65-1158-TC Civ. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for hearing on June 22, 24 and 27, 1966, before the Court, Honorable Thurmond Clarke, District Judge, presiding, Wright, Wright, Goldwater and Mack, by Loyd

Wright and Andrew J. Davis, Jr., appeared as counsel for plaintiff, and Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr., M. Morton Freilich, Assistant United States Attorneys, and Benjamin C. Flannagan, Attorney, Department of Justice, by M. Morton Freilich and Benjamin C. Flannagan, appeared as counsel for defendants. The Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, and the Court being fully advised in the premises, makes its Findings of Fact as follows:

FINDINGS OF FACT

It is true that:

1. Plaintiff, Joseph J. Remenyi, is a citizen of the United States and since October 4, 1954 has resided in Los Angeles County, California.

2. The Department of Defense of the United States of America is charged with the duty of clearing individuals for access to classified government information pursuant to Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960.

3. Defendant, Robert S. McNamara, since January 10, 1961, has been, and he now is, the duly appointed and acting Secretary of the Department of Defense of the United States of

America.

4. Defendant Walter T. Skallerup, Jr., since December 7, 1963, has been, and he now is, the Deputy Assistant Secretary of the Department of Defense of the United States of America, primarily charged with the administration of matters falling under the said Department of Defense Directive 5220.6.

5. On or about February 6, 1959, plaintiff was employed by Rocketdyne Division, North American Aviation, Inc., at Canoga Park, California, as a specialist in materials and liquid propulsion engineering.

6. In connection with said employment on February 6, 1959, plaintiff applied to the Department of Defense of the United States for clearance at the "Secret" level pursuant to Department of Defense Directive 5220.6.

7. Plaintiff continued in his said employment until November 7, 1963, on which date defendant Walter T. Skallerup, Jr., in his said official capacity, notified plaintiff and his employer that any authorization plaintiff possessed for access to United States Army, Navy or Air Force classified information was suspended.

8. The employment of plaintiff at Rocketdyne Division, North American Aviation, Inc. required that plaintiff have clearance for access to United States Army, Navy and Air Force information classified as "Secret". Upon receipt of the notification described in 7 above,

plaintiff's employer, because of said notification, immediately placed plaintiff on a leave of absence. On December 29, 1963, plaintiff's employer terminated plaintiff's employment because of said notification.

9. On November 7, 1963, the monthly salary of plaintiff at Rocketdyne Division, North American Aviation, Inc. was Thirteen Hundred and Fifty-Six Dollars ($1, 356. 00).

10. On November 12, 1963, defendants notified plaintiff of his rights to have a personal appearance proceeding pursuant to the provisions of Department of Defense Directive 5220. 6.

11. Plaintiff elected to have such a personal appearance proceeding, and on February 12, 13, 14 and 15, 1964 a personal appearance proceeding was held before the Los Angeles Personnel Access Authorization Field Board in Santa Monica, California on plaintiff's application for access authorization at the Secret level.

12. On June 2, 1965, the Central Industrial Personnel Access Authorization Board, in Washington, D. C., finally determined that the granting of authorization to plaintiff for access to any classified information was not clearly consistent with the national interest.

13. The personal appearance proceeding, mentioned in 11 above, and the determination by the Central Industrial Personnel Access Authorization Board, mentioned in 12 above, which resulted in a denial to plaintiff of authorization

for access to any classified information was arbitrary and failed to conform to the requirements of due process because of the following facts:

a. Plaintiff was not permitted to confront the witness testifying against him, nor to know that witness' identity;

b. The transcript of the personal appearance proceedings held February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings;

c. Counsel representing defendants improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of plaintiff or plaintiff's counsel and without consent on the part of plaintiff or plaintiff's counsel;

d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board;

14. Defendants, on the record of the personal appearance proceedings, abused their discretion in determining that the granting of access authorization to plaintiff for information classified at the Secret level was not consistent with the national interest.

15. Following termination of his

employment at Rocketdyne Division, North American Aviation, Inc. on December 29, 1963, plaintiff continuously made reasonable efforts to find regular employment, but until February 1, 1966, when he found regular employment at a monthly salary of Six Hundred Fifty Dollars ($650.00), he was denied all reasonable employment on the basis that he did not have clearance for access to classified information.

16. During the period January 1, 1964, until February 1, 1966, plaintiff could find only part-time employment as a consultant and earned a total of approximately Seven Thousand Dollars ($7,000.00).

17. The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this Court to be true in all respects.

From the Foregoing Facts, The Court Concludes:

18. That it has jurisdiction of this case, pursuant to the provisions of Title 5, U.S.C. Section 1009 et seq., Title 28, U.S.C. Sections 2201 and 2202.

19. Venue herein is invoked pursuant to the provisions of Title 28, U.S.C. Section 1391 (e) (2) and (4).

20. This Court has no jurisdiction to award plaintiff damages.

21. The personal appearance before the Field Board and the Central Industrial Personnel Access Authorization Board proceedings, which resulted in a denial to plaintiff of authorization for access to classified information were conducted in an arbitrary manner and did not conform to the requirements of due process, and all testimony of the witness, referred to in 13 a above, and all stipulations of counsel concerning that witness and said witnesses' testimony should be expunged from the record of the personal appearance proceedings before said Field Board and said Authorization Board.

22. The determination by the Central Industrial Personnel Access Authorization Board and the Los Angeles Industrial Personnel Access Authorization Field Board that access authorization to plaintiff for classified information was not in the national interests was arbitrary and an abuse of discretion.

23. On the record of the personal appearance proceeding before the Central Board and the Field Board, the granting of access authorization to plaintiff for information classified at the Secret level is clearly consistent with the national interests.

24. This matter should be remanded to the Central Industrial Personnel Access Authorization Board for further proceedings not inconsistent herewith.

Dated at Los Angeles, California, this 16th day of August, 1966.

/s/ Thurmond Clarke
United States District Judge

APPROVED AS TO FORM AND CONTENT

THIS ___ DAY OF JULY, 1966.

MANUEL L. REAL, United States Attorney, FREDERICK M. BROSIO, JR. and M. MORTON FREILICH, Assistant United States Attorney, and BENJAMIN C. FLANNAGAN, Attorney, Department of Justice

By _____
Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Findings of Fact and Conclusions of Law have been served by mail upon defendants herein by mailing true copies thereof to defendants' attorneys, Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr. and M. Morton Freilich, Assistant United States Attorneys, at Room 600, 312 N. Spring Street, Los Angeles, California.

Dated: July 15, 1966.

Andrew J. Davis, Jr.

Andrew J. Davis. Jr.

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Clerk, U.S. District Court
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

JOSEPH J. REMENYI, Plaintiff, vs. ROBERT S. McNAMARA, Secretary of Defense, WALTER T. SKALLERUP, JR., Deputy Assistant Secretary of Defense, Defendants.	)	No. 65-1158-TC Civ. JUDGMENT

This action came on for hearing on June 22, 24 and 27, 1966, before the Court, Honorable

Thurmond Clarke, District Judge, presiding, Wright, Wright, Goldwater and Mack, by Loyd Wright and Andrew J. Davis, Jr., appeared as counsel for plaintiff, and Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr. and M. Morton Freilich, Assistant United States Attorneys, and Benjamin C. Flannagan, Attorney, Department of Justice, by M. Morton Freilich and Benjamin C. Flannagan, appeared as counsel for defendants. The Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, and the Court being fully advised in the premises, and having made and filed its Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED as follows:

1. That the personal appearance proceedings before the Central Industrial Personnel Access Authorization Board and the Los Angeles Industrial Personnel Access Authorization Field Board concerning plaintiff were conducted in an arbitrary manner and did not conform to requirements of due process; and that all testimony of the witness, referred to in paragraph 13a of the Findings of Fact and paragraph 21 of the Conclusions of Law, and all stipulations of counsel concerning that witness and said witnesses' testimony, be and the same are hereby expunged from the record of the personal appearance proceedings before said Field Board and said Authorization Board;

2. That plaintiff be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force;

3. This matter is remanded to the Central Industrial Personnel Access Authorization Board for further proceedings in conformity with this Judgment.

Dated at Los Angeles, California, this 16th day of August, 1966.

/s/ Thurmond Clarke
United States District Judge

APPROVED AS TO FORM AND CONTENT
THIS ___ DAY OF JULY, 1966.

MANUEL L. REAL, United States Attorney, FREDERICK M. BROSIO, JR. and M. MORTON FREILICH, Assistant United States Attorneys, and BENJAMIN C. FLANNAGAN, Attorney, Department of Justice

By _____
Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Judgment has been served by mail upon defendants herein by mailing true copies thereof to defendants' attorneys, Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr. and M. Morton Freilich, Assistant United States Attorneys, at Room 600, 312 N. Spring Street, Los Angeles, California.

Dated: July 15, 1966.

Andrew J. Davis, Jr.

Andrew J. Davis, Jr.

APPENDIX "C"

EXECUTIVE ORDER

10865

SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interests:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in

Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. (a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry

which such other department or agency has responsibility for safeguarding.

* * *

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be

prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording

such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehen-

sive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

* * *

SECTION 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

* * *

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

SEAL
DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

July 28, 1960
NUMBER
5220.6

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Industrial Personnel Access Authorization Review Regulation

Reference: (a) DOD Directive 5220.6, entitled "Industrial-Personnel Security Review Regulation", dated February 2, 1955, as amended (cancelled)

I. GENERAL

A. Authority

This Regulation is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense.

* * *

B. Purpose

1. The Secretary of Defense and the Administrators of the Federal Aviation Agency, and the National Aeronautics and Space Administration have prescribed specific

requirements, restrictions, and other safeguards which they consider necessary to protect (a) releases of classified information to or within United States industry that relate to bids, negotiations, awards, or the performance or termination of contracts with their department or agency, and (b) other releases of classified information to or within industry which their department or agency has responsibility for safeguarding. In this connection, this Regulation prescribes uniform standards, criteria, and procedures for processing to final determination all cases which come within the scope of the Industrial Personnel Access Authorization Review Program.

* * *

3. This Regulation is issued to conform the Industrial Personnel Access Authorization Review Program to the requirements of Executive Order 10865.

C. Definitions

* * *

2. Access Authorization: An authorization to have access to one or more categories of information classified in accordance with Executive Order 10501. (NOTE: Actual access, when authorized, requires both an access authorization and a "need to know".) In the case of a contractor, an "access authorization" is an authorization for the contractor involved to have access to specific categories of classified information provided such access is (a) required in connection with the bidding, negotiation, award, performance or termination of contracts with a Department of Defense agency or activity or (b) required in connection with other releases of classified information to or within industry. In the case of a contractor employee, an "access authorization" is an authorization for the employee to have access to specific categories of classified information provided such access is (1) required for the performance of his work with a particular contractor on

contracts with a Department of Defense agency or activity or (2) required in connection with the release of classified information to or within industry.

* * *

5. Applicant: Any person who is eligible to have the matter of granting, revoking, or denying him an access authorization determined or reconsidered under the Industrial Personnel Access Authorization Review Program as provided for in paragraphs I. F. and V. B.

* * *

7. Personal appearance proceeding: A proceeding before the New York, Washington, or Los Angeles Industrial Personnel Access Authorization Field Board convened and conducted in accordance with this Regulation. The use of the terms "personal appearance proceeding" or "proceeding" in this Regulation does not imply, and shall not be construed to mean, that such procedures are subject to the provisions of the Administrative

Procedure Act, or that the rules of evidence customary in the courts of the United States shall be applied.

D. Policy

1. The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available information justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

2. A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Regulation

adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned. A determination under this Regulation favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

* * *

I. STANDARD AND CRITERIA

A. Standard for Issuing an Access Authorization

Authorization for access to classified information of a specific classification category shall be granted or continued only if it is determined that such access by the applicant is clearly consistent with the national interest.

B. Criteria for Application of Standard in Cases Involving Individuals

1. Commission of any act of sabotage, espionage, treason, or sedition or attempts threat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

2. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, revolutionist, or with an espionage agent or other secret representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

3. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

4. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

5. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

6. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

7. Participation in the activities of an organization established as a front for an organization referred

to in subparagraph 4., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.

8. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

9. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

10. Sympathetic association with a member, or members, of an organization referred to in subparagraph 4., above.

(Paragraphs 11. through 19 and part of paragraph 20 have been omitted.)

such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relative which may be likely

to cause action contrary to the national interest.

21. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional or legislative committee, or Federal or State court or other tribunal, regarding charges of his alleged disloyalty or other misconduct.

C. Guidance for the Application of the Standard and Criteria

1. The activities and associations listed in paragraph III. B., above, describe conduct which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access authorization. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination of whether an authorization should be granted or continued must be an over-all common-sense one on the basis of all the information which may properly be considered under this Regulation including but not restricted to such factors, when

appropriate, as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

2. Legitimate labor activities shall not be considered in determining whether access authorization should be granted or continued.

3. It is essential to the efficient, economical, and equitable operation not only of the Industrial Personnel Access Authorization Review Program, but of the total procedures whereby the Department of Defense authorizes access to classified information, that applicants provide full, frank and truthful answers when they complete official questionnaires or other similar documents, or respond to official inquiries. Accordingly, the deliberate giving of false or misleading testimony or information on relevant matters, may be

sufficient standing alone to justify denying or revoking access authorization and shall be weighed carefully before a determination is reached under this Program.

4. The granting or continuing of an authorization for access to a contractor is not clearly consistent with the national interest if the access authorization of an owner, officer, director, or any executive of the contractor who is required to have such an access authorization, has not been, or would not be, granted under the standard and criteria set forth in paragraphs III. A. and III. B., above.

IV. PROCESSING OF CASES

* * *

C. Initial Adjudication Procedures (Screening Board Action)

1. The Screening Board shall review each case referred to it by the Director and shall determine in accordance with the standard and criteria set forth in paragraph III whether the reported information warrants (a) authorizing or continuing to authorize access at the specific classification category requested or (b) further processing as set forth below.

* * *

3. The Screening Board may, with respect to any case pending before it, determine at any time that an existing authorization shall be suspended. Upon any such determination, the Director shall notify the applicant, the contractor, the office of the cognizant military department and the agency or activity which forwarded the case to him.

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#First amendment (Ch 1, 4/5/63)

5. If the Screening Board concludes on the basis of the information available to it and in accordance with the standard and criteria set forth in paragraph III that the case does not warrant a determination favorable to the applicant, it shall prepare a Statement of Reasons informing the applicant of the grounds upon which his access authorization may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits. At the time a Statement of Reasons is issued, any access authorization previously granted for Secret or Top Secret shall be suspended or limited to Confidential unless such access authorization was granted pursuant to board action under any industrial personnel review program in which case the Screening Board shall determine whether the access authorization should be suspended or limited. The Screening Board shall also determine whether any access authorization previously granted for Confidential should be suspended or limited.

6. The Director shall forward the

Statement of Reasons and a copy of this Regulation to the applicant and shall inform him of the status of his access authorization pending a final determination. An applicant who has been served with a Statement of Reasons and who has filed under oath or affirmation a written reply thereto which complies with the requirements of paragraph IV. C. 7 shall be afforded:

a. An opportunity to appear personally before a Field Board for the purpose of supporting his eligibility for access authorization and of presenting evidence on his own behalf.

b. A reasonable time to prepare for that appearance.

c. An opportunity to be represented by counsel without cost to the Government.

d. The opportunity to cross-examine adverse witnesses prescribed in paragraph IV. E. 2.

* * *

D. Personal Appearance

* * *

3. It is to the advantage of both the applicant and the Department to shorten and simplify the proceedings before the Field Board by stating the issues and arriving at an agreed-upon version of the facts in the case when it is possible to do so. Department counsel is authorized to consult directly with the applicant, or if he has counsel or representative, with them, for purposes of reaching mutual agreement upon arrangements for an expeditious proceeding in the case. Such arrangements may include clarification of issues, and stipulations with respect to testimony and the contents of documents and other physical evidence. Such stipulations when entered into shall be binding upon the applicant and the Department of Defense for the purpose of these proceedings.

* * *

E. Procedures for Personal Appearance Proceedings

1. General Provisions

* * *

2. Introduction of Information

a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissable in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound dfscretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.

b. Unless permitted by paragraphs e. and f., below, the record may contain no information adverse to the applicant on any controverted issue unless (1) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (2) the information or its sub-

stance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this paragraph, or by any other provision of this Regulation, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Regulation.

* * *

f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circum-

stances described in either of the following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to Section 4 (a), (2), of

Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the

National Aeronautics and Space Administration to be good and sufficient.

* * *

F. Field Board's Report

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Autho rization Board. The report shall not be made available to the applicant.

2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the Statement of Reasons and any

amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. Action by the Central Industrial Personnel Access Authorization Board

* * *

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:

a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and through the Director, shall give notice thereof to both the applicant and department counsel with copies of the tentative decision and proposed findings as previously furnished to the

applicant.

* * *

I. Procedure after final determinations

1. Final determinations reached by the Central Board shall be announced by the Director who shall notify the applicant of the determination in his case. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified of (1) the final conclusion reached, and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

2. Final determinations reached by the Secretary of Defense or the Administrator concerned shall be announced by the Director. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified only of (1) the final conclusion reached and (2) whether a finding was for or against him with respect to each

allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

3. Determinations of the Central Board shall be final subject only to:

   a. Reconsideration on its own motion, or at the request of the applicant, addressed through the Director, after it has made a finding that there is newly discovered evidence or that other good cause has been shown;

   b. Reconsideration by the Central Board at the request of the Secretary of Defense, the Secretary of any military department, the Director, or when appropriate, the Administrator concerned.

   c. Reversal by the Secretary of Defense or in agency cases reversal by the Administrator concerned after consultation with the Secretary of Defense.

* * * *

K. Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration

Nothing contained in this Regulation shall

be deemed to limit or affect the responsibility and powers of the Secretary of Defense or of any Adminstrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

* * *

#First amendment (Ch 3, 11/16/63)

Scope of review. -- To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P. L. 89-554, §1, 80 Stat. 393.)

Prior law. -- This section is based on Act June 11, 1946, c. 324, §10(e), 60 Stat. 243 (§1009(e) of former Title 5).

THE BRIEF SHOP